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IN THE

# In the Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 71-925

SEARS, ROEBUCK & CO.
and
TERMINAL FREIGHT COOPERATIVE ASSOCIATION
and
TERMINAL FREIGHT HANDLING CO.,
*Petitioners,*

v.

JOSEPH S. H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, and Miscellaneous Drivers and Helpers Union, Local No. 610, affiliated with the International Brotherhood Teamsters, Chauffeurs, Warehousemen and Helpers of America,
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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## REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI[1]

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[1] Although the petition herein was originally filed by Terminal Freight Cooperative Association and Terminal Freight Handling Co., Sears Roebuck & Co. subsequently filed an unopposed motion to intervene. The caption of this case reflects Sears' desire to participate as co-petitioner herein.

Just as the four *Solien* cases now pending in this Court are interrelated[2] (the instant case bearing the designation of *Solien IV*)—so also has the General Counsel of the National Labor Relations Board responded to the Petition for Writ of Certiorari in each of those cases in a similar fashion. The General Counsel has in each instance sought to focus attention not on the important question of general applicability which have been presented for resolution, but on his version of the facts of the cases. In this fashion, the General Counsel seeks to avoid an ultimate judicial clarification of the related issues which have been raised in favor of perpetuating the present and unnecessary confusion which permeates the area.[3]

1. The General Counsel asserts that the Objections to the Stipulation-in-lieu of injunction which were filed in the district court and which have given rise to the issues presented here were ultimately filed. That assertion assumes that no intervening events occurred which rendered those objections timely and appropriate. The entire thrust of the Petitioners' argument, however, is that the issuance by the Eighth Circuit of its decision in *Solien II* constituted such an intervening event. The General Counsel's assumption, therefore, constitutes an attempted resolution of the issues presented without argument.

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[2] *Solien* v. *Miscellaneous Drivers and Helpers Union, Local No. 610*, 440 F.2d 124 (CA 8, 1971), Pet. for Rehearing pending; (No. 1588; *Solien I*); *Terminal Freight Handling Co., et al.* v. *Solien*, 444 F.2d 699 (CA 8, 1971) (No. 71-609; *Solien II*); *Sears Roebuck and Co., et al.* v. *Solien*, 450 F.2d 353 (CA 8, 1971) (No. 71-924; *Solien III*); *Terminal Freight Cooperative Association, et al.* v. *Solien*, 447 F.2d 1099 (CA 8, 1971) (No. 71-925; *Solien IV*). The nature of the interrelationship of those cases is described in the second Petition for Rehearing in *Solien I*, pp. 2-4.

[3] The nature of the General Counsel's Opposition to this Court's consideration of the issues presented in the *Solien* cases is described in more detail in the Reply to Opposition to Petition for Writ of Certiorari in *Solien III*.

*Solien I* held that charging parties do not constitute "parties" in proceedings under Section 10(l) of the National Labor Relations Act. The General Counsel's Opposition herein (p. 5) interprets that holding to "foreclose" the charging parties from protesting to the district court that the relief afforded by the stipulation was inadequate to cure the unlawful conduct to which it had been subjected and that injunctive relief should be granted. Presumably, the General Counsel believed that, absent "party" status, the beneficiary of statutorily afforded relief may not protest to the Court that the compromise relief negotiated by the General Counsel is less than Congress intended or provided.

Whatever merit such an interpretation of the statute might have had after *Solien I*, the situation changed after the issuance of *Solien II*, which provided:

> "If a settlement in lieu of injunctive relief negotiated by the regional director fails to adequately protect the public interest, the district court can override the settlement and grant injunctive relief."

It would appear that the General Counsel's interpretation of the rights flowing to charging parties under Section 10(l) is expressly contradicted by *Solien II*. By acknowledging the district court's authority to override inadequate settlements, the court necessarily grants to the charging parties the standing to so petition to the district court. Neither the union, the beneficiary of the alleged inadequacy, nor the General Counsel who approved it and urged it on the court could be expected to protest the terms of their own agreed settlement. Only the charging parties would do so. Thus, by necessary implication, *Solien II* granted standing to the charging parties to file the Objections which the General Counsel asserts here to be "foreclosed" by *Solien I*.

Accordingly, this case raises the important question of the relationship of "party" status to the existence of

standing to protest violations of statutory entitlement, and not merely the factual question as to whether the Objections were timely filed, given the fourteen months' lapse of time after *Solien I*. It presents for resolution apparently conflicting appellate decisions which must be harmonized in order to present recurring conflict among opposing litigants in proceedings arising under Section 10(l).

2. The General Counsel's suggestion that Petitioners might have sought review of the district court's order approving the Stipulation as well as its order denying "party" status is not a consideration which should affect the Court's willingness to resolve the important issues raised in this case. Had the court below ruled favorably to petitioners on the party status question in *Solien I*, access would thereby have been afforded to the district court to achieve a modification of the terms of the Stipulation in accordance with Petitioners' needs; that was Petitioners' intention and design. While the Court below did not render such a favorable ruling in *Solien I*, it subsequently did so in a less direct fashion in *Solien II*. The latter consideration, together with the fact that the Stipulation remains in force to this date, and continues to constitute the charging parties' sole protection against a resumption of the union's unlawful boycott, legitimizes petitioners' continuing access to the district court.

More fundamentally, however, the four *Solien* cases constitute a mosaic of the problems presented in identifying charging parties' proper participatory role under the National Labor Relations Act. The instant case constitutes an important aspect of the total picture. It should therefore be considered in order that the Court may have a more encompassing view of the nature of the problems which exist and the range of the consequences of any decision the Court may render.

3. The General Counsel's description of the rights claimed by Petitioners, as charging parties under Sec-

tion 10(l), contains two misstatements which should be clarified. First, Petitioners do not assert their unqualified rights to examine the Board's files in order to secure information by which to evaluate the merits of any proposed Stipulation. Rather, the narrower and qualified right asserted is described in the Petition for Writ of Certiorari herein, at p. 17. Second, Petitioners do not claim a right to apply unilaterally for injunctive relief in the absence of a pending injunction petition filed by the Regional Director and do not object to the Stipulation approved by the district court herein because it fails to grant such a right (Opp. Cert., p. 3). Petitioners recognize that under the scheme of the National Labor Relations Act and in view of the prohibitions of the Norris LaGuardia Act, 29 U.S.C. § 107, only the Board's agents may institute proceedings for injunctive relief. However, once the injunction petition has been filed, and while it remains pending, Petitioners have the right to support it and urge its success even where the Board's agents subsequently determine to seek lesser relief. *Solien II; Retail Clerks Union, Local 137* v. *Food Employers Council, Inc.*, 351 F.2d 525 (CA 9, 1965).

Contrary to the General Counsel's assertion in his Opposition (at p. 5) that the resolution of the claim of rights which is raised in this case "necessarily turns on the particular facts and thus does not warrant review by this Court", such claims involve disputed interpreta-

tions of Congressional intent which should be adjudicated.

Respectfully submitted,

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